SUPREME COURT, U. S.

FILED

In the Supreme Court of the United States

OCTOBER TERM 1973

NO. 73-391

BEHRING PROPERTIES, INC., BEHRING CORPORATION, L. T. AHRENHOLZ AND MARY L. AHRENHOLZ,

Petitioners,

vs.

SUN OIL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your petitioners, BEHRING PROPERTIES, INC., BEHRING CORPORATION, L. T. AHRENHOLZ, AND

MARY L. AHRENHOLZ, hereby petition this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment, decision and opinions in the case of Sun Oil Company, plaintiff-appellant, vs. Behring Properties, Inc., et al., defendants, Case No. 72-2493, reversing and remanding the final judgment entered for the petitioners by the United States District Court in and for the Southern District of Florida.

I

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing filed by the petitioners is unreported to date (Appendix A to Petition). The opinion and judgment of the United States Court of Appeals for the Fifth Circuit reversing and remanding the final judgment entered for the petitioners by the District Court is unreported to date (Appendix B to Petition). The final judgment entered in favor of the petitioners by the United States District Court In and For the Southern District of Florida is unreported (Appendix C to Petition). The order of the United States District Court for the Southern District of Florida denying the motion of the Respondents for new trial, judgment notwithstanding verdict, and remittitur, is unreported (Appendix H to Petition).

II

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing was entered on June 6, 1978 (Appendix A to Petition). The judgment, opinion, and decision to which the court adhered on rehearing was entered on April 10, 1978 (Appendix B). Upon motions of the petitioners for recall and stay of mandate and for a continuation of stay of mandate, the United States Court of Appeals for the Fifth Circuit has stayed the mandate to and including September 4, 1978 (Appendix D and E to Petition). This petition for certiorari is filed within 90 days from the date of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under U.S. Sup.Ct.Rule 19, §1(b), 28 U.S.C.A.; and 28 U.S.C.A., §1254(1) and 2101(c).

III

QUESTIONS PRESENTED

1. WHETHER THE DETERMINATION BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE PETITIONER, L. T. AHRENHOLZ, AS PRINCIPAL, WAS BOUND AS TO THE CHANGE IN DATE OF SETTLEMENT BY THE UNAUTHORIZED REPRESENTATIONS OF ITS AGENT, A REPRESENTATIVE OF THE PETITIONER, BEHRING, IF TRUE REPRESENTATIONS AS TO THE SAME MATTER WERE WITHIN THE AGENT'S AUTHORITY AND

IF THE RESPONDENT, SUN OIL CO., HAD NO NOTICE THAT THE REPRESENTATIONS WERE UNAUTHORIZED CONFLICTS WITH APPLICABLE FLORIDA LAW.

2. WHETHER THE OPINIONS RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT VIOLATED THE RIGHTS OF THE PETITIONERS, BEHRING CORPORATION AND L. T. AHRENHOLZ, SEVERALLY, TO TRIAL BY JURY AS GUARANTEED BY AMENDMENT VII TO THE CONSTITUTION OF THE UNITED STATES BY REVERSING A JURY VERDICT FOR THE PETITIONERS.

3. WHETHER THE OPINIONS RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, BEING PREDICATED UPON A PROPOSED PRETRIAL STIPULATION NOT ACCEPTED BY THE PETITIONERS, VIOLATED THE RIGHTS OF THE PETITIONERS, BEHRING CORPORATION AND L. T. AHRENHOLZ, SEVERALLY, TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES.

IV

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VII

"In suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, according to the Rules of the common law."

V

STATEMENT OF THE CASE

The petitioners were the defendants-counter-plaintiffs at the District Court level and the appellees before the United States Court of Appeals for the Fifth Circuit. The

respondent was the plaintiff-counter-defendant at the District Court level and the appellant before the United States Court of Appeals for the Fifth Circuit. Reference to the transcript of trial proceedings in the record on appeal will be by the use of the symbol "R." Reference to petitioner's exhibits at trial will be by the use of the symbol "PX."; reference to the respondent's exhibits at trial will be by use of the symbol "DX." The petitioner, BEHRING PROPERTIES, INC. was merged by an agreement of merger into the petitioner, BEHRING CORPORATION, and all reference to said petitioners will be to BEHRING (R. 343).

The parties will be referred to in the position they occupy before this Court and in their proper name.

Behring, as seller executed an agreement prepared by Sun Oil to sell certain land to the latter located in the City of Tamarac, Broward County, Florida (PX No. 1; DX Nos. 3, 13).

Pertinent provisions of the agreement of sale were that the purchase price was $75,000; that Sun Oil intended to use the premises for a gasoline service and filling station; that the premises would be free and clear of all liens, easements, restrictions and encumbrances; that the title shall be good and marketable and insurable by a title insurance company; that necessary permits to operate a gas station would be obtainable (PX No. 1; DX No. 13).

As to "Settlement", it was provided that settlement shall be held on or before the 15th day of July, 1969, unless the aforesaid provisions were not satisfied (Ibid). The settlement provision also provided that the buyer at its option upon written notice to the seller could extend the date of

settlement for a period of 180 days in order to afford an opportunity to clear any defects in the title, etc. (Ibid).

Although the agreement of sale was executed by Behring on March 12, 1969, Sun Oil did not approve the agreement until July 14, 1969, subject to certain changes being made to the agreement (R. 28-30). These changes to the agreement of sale concerned 1) description of the property, 2) a special clause to be attached to the back of the instrument providing that the agreement was conditioned on certain rights of way being dedicated by the seller and accepted by Broward County, Florida and 3) that the closing date would be changed from July 15, 1969, to September 25, 1969 (R. 29-34, 64, 65).

In order to achieve the foregoing changes, Sun Oil's representative Homer Campbell had a meeting with Richard Anderson, Behring's representative, on July 25, 1969, at which time the aforesaid changes were discussed (R. 30-34).

At the meeting of Campbell and Anderson, the former was told that the property had been sold to L. T. Ahrenholz (on June 30, 1969) and that any extension of time to close the deal would have to be obtained from Mr. Ahrenholz (R. 31, 88, 89, 174).

On July 25, 1969, L. T. Ahrenholz spoke to William Morse, Attorney for Behring (R. 194). Ahrenholz agreed to extend the time to close the transaction *only* until September 25, 1969 (R. 175-177, 198, 199), and certainly not to extend the closing date for another eight months (R. 199). Accordingly, Anderson on July 25, 1969, after speaking with Mr. Morse, initialled that portion of the

agreement of sale changing the settlement date from the 15th day of July, 1969 to the 25th day of September, 1969 (R. 33, 34, 174-177; PX No. 1, DX No. 13).

Other changes to the agreement of sale initialled by Anderson were the change in the description of the property and the attachment of Special Clause No. 2 to the back of the contract, providing that the agreement was conditioned on certain rights of way being dedicated by the seller to Broward County (R. 29, 33; PX No. 1; DX No. 13).

The sale of land was not closed on September 25, 1969 (R. 36, 37). Sun Oil's representatives assigned the following reasons for delaying the closing on the sale of the property beyond the closing date of September 25, 1969; Sun Oil was concerned with the drainage or flood control district reservation excepted in a title binder written by a title insurance company on September 10, 1969 (R. 40, 42, 43, 65, 66, 74; PX No. 3).

Sun Oil was advised on October 6, 1969, and again on October 21, 1969, that such a reservation under Florida law does not constitute a cloud on the title justifying a delay in closing. Further, Sun Oil was advised that such a reservation can be removed within sixty to ninety days (DX Nos. 21, 22).

Another excuse for not closing advanced by Sun Oil was the need for a building permit to construct the gas station (R. 38, 39, 66). A building permit was granted prior to September 30, 1969, and was never a problem (R. 66; DX Nos. 20 A, 20 B).

Sun Oil also complained about restrictions contained in Behring's dedication to the public as concerns gas stations on the property in question (R. 43-45; PX Nos. 3-5). Sun Oil's representative, Campbell admitted these restrictions were satisfied (R. 45).

Sun Oil objected also to the utility easement restriction (R. 44, 45; PX Nos. 4, 5). Sun Oil was advised by letter on December 8, 1969, from Behring's counsel that the land could not be conveyed free and clear of the utility easement (DX No. 23). Sun Oil was told either to acquiesce to the easement or to release Behring on the agreement of sale (DX No. 23). Additionally, Behring's attorney insisted upon an immediate response as to whether Sun Oil would accept the utility easement or cancel the contract (DX No. 23).

No response was made to the letter of December 8, 1969, until December 18, 1969, when Behring's attorney was advised that the matter would be discussed within a week (R. 103, 104; DX No. 25). In any event, the meeting was held between the representatives of Behring and Sun Oil Company in December 1969, and the utility easement restriction was resolved (R. 103-104, 109, 110).

Sun Oil's final excuse for not closing timely dealt with Behring's dedication of certain streets adjoining the proposed gas station site. Sun Oil was advised by Behring's attorney on October 6, 1969, that the dedication of the right of way by Behring to the county was a simple matter (DX No. 21). In this regard, Campbell of Sun Oil, admitted that he stated in his letter of October 14, 1969, that the matter of the dedication of the right of way in Special Clause No. 2, attached to the agreement of sale was no problem (R. 74, 75; PX No. 10).

Campbell admitted candidly that from March 12, 1969, until October 14, 1969, Sun Oil Company never questioned any of the so-called restrictions (R. 71, 72). It should be noted that the title binder was written September 10, 1969, and amended on September 23, 1969 (PX No. 3).

Sun Oil claimed that it gave notice to Behring by a letter dated September 24, 1969, that it was extending the date of settlement for a period not to exceed 180 days beyond September 25, 1969 (DX No. 18 A).

The special clause on "Notices" on the back of the agreement of sale requires that all notices to the seller shall be mailed to Behring at 2800 E. Oakland Park Boulevard, Ft. Lauderdale, Florida (PX No. 1).[1] The letter in question was mailed to 4800 E. Oakland Park Boulevard, and the return receipt on the certified letter indicates delivery on September 27, 1969 (PX No. 7; DX No. 18A).

Mr. Campbell admitted that no notice in writing was given to Behring requesting an extension prior to September 25, 1969 (R. 85-87).

By letter of October 6, 1969, Behring requested Sun Oil for a closing date for the latter part of the same week or for the early part of the following week (DX No. 21). Again, on October 21, 1969, Behring requested Sun Oil by letter to set a closing date for the following week (DX No. 22). Once again, on December 8, 1969, Behring requested Sun Oil to either accept a "modified utility easement" or

[1]As of June 30, 1969, L. T. Ahrenholz was the owner of the property but no notice attempting to extend the time for settlement beyond September 25, 1969, was given to him. As stated, *supra*, Sun Oil was told on July 25, 1969, that any extension of time to close the deal would have to be obtained from Mr. Ahrenholz (R. 31, 88, 89. 174).

release Behring from any further obligation under the contract (DX No. 23). The final request for a closing date was made in a letter from Behring to Sun Oil on February 6, 1970 (DX No. 29). Subsequent to this final written request for a closing date, Mr. Campbell refrained from giving a closing date to Behring's attorney (R. 189).

Accordingly, L. T. Ahrenholz in a letter written February 20, 1970, notified Sun Oil that the extreme delay constituted a breach of the agreement of sale dated March 12, 1969 (PX No. 30).

Approximately, three weeks later, on Friday, March 13, 1970, Sun Oil notified Behring and L. T. Ahrenholz to be at a closing on the following Tuesday, March 17, 1970 (DX No. 32 B).

Mr. Ahrenholz stated for a consideration of $67,000 he received the deed to the property on June 30, 1969 (R. 191). He executed a mortgage to Behring for $50,000, paying the balance of the purchase price in cash (R. 191; PX No. 3).

The interest rate on the mortgage was 6½% (R. 192). Ahrenholz testified that the accrued interest to date from September 25, 1969, was $11,400 (R. 192, 193).

Taxes paid on the property were as follows: $13.28 in 1969; $105.12 in 1970; $454.65 in 1971 (R. 193).

Mr. Ahrenholz stated that the deal was supposed to close prior to making his first payment (R. 201). He testified further that because the deal was not consummated he has been unable to make payments on the mortgage

(R. 201). As a result he is delinquent and paying 10% on the mortgage loan (R. 192, 200, 201).

Sun Oil filed a complaint in the United States District Court for the Southern District of Florida seeking specific performance of the above-described contract to convey certain real property in Broward County, Florida (R.T. 77-289). Behring filed its answer denying all material allegations of the complaint (R. 318-321), and counter-claimed to impress an equitable lien upon the land in question as security for the purchase price (R. 318-321, 356). The answer of L. T. AHRENHOLZ and MARY L. AHRENHOLZ denied the pertinent allegations of the complaint (R. 322-324). In addition, L. T. AHRENHOLZ filed a counter-claim against Sun Oil alleging that he purchased the land from Behring subject to the agreement of sale between Behring and Sun Oil Co. allegedly executed on March 12, 1969; further that L. T. Ahrenholz obligated himself for a $50,000 purchase money mortgage to Behring and that Sun Oil was given an extension of time to close until September 25, 1969, with the latter's full knowledge of the financial obligations of Ahrenholz. L. T. Ahrenholz alleged that Sun Oil delayed unreasonably the closing of the contract and breached its terms causing damages (R. 324-327).

Sun Oil answered the counter-claims of Behring and L. T. Ahrenholz denying the pertinent allegations of said counter-claims (R. 361, 363, 364).

By order of November 5, 1971, the United States District Court, upon motion by L. T. Ahrenholz and Mary L. Ahrenholz to amend the record of the pre-trial conference

to provide for the trial of the cause before a jury, granted said motion and ordered that the cause would proceed to trial by jury (Appendix F to Petition).

Following a trial by jury, a verdict was entered for the petitioners and damages awarded to L. T. Ahrenholz in the amount of $7500 against Sun Oil (Appendix G to Petition).

Accordingly, a final judgment was entered by the District Court denying the respondent's action for specific performance and awarding L. T. Ahrenholz the sum of $7500 on his counterclaim (Appendix C to Petition). The motion of Sun Oil for judgment notwithstanding verdict, remittitur, and new trial was denied by the District Court on April 5, 1972 (Appendix H to Petition).

The United States Court of Appeals for the Fifth Circuit on April 10, 1973, reversed the final judgment of the District Court and remanded the cause to said District Court to grant specific performance to respondent, Sun Oil (Appendix B to Petition), and on June 6, 1973, denied the petition for rehearing filed by the petitioners (Appendix A to Petition).

VI

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction over the cause in the United States District Court for the Southern District of Florida was diversity of citizenship and a jurisdictional amount in excess of $10,000, exclusive of interest and costs.

VII

HOW CONSTITUTIONAL QUESTIONS WERE RAISED

The violation of the petitioner's rights under Amendment V and VII of the Constitution of the United States was first raised in the petition for rehearing filed by the petitioners in the United States Court of Appeals for the Fifth Circuit, since it was the opinion of the United States Court of Appeals for the Fifth Circuit reversing the lower court decision which for the first time violated such rights of the petitioners (Appendix B to Petition).

VIII

REASONS FOR GRANTING THE WRIT

1. THE DETERMINATION BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE PETITIONER, L. T. AHRENHOLZ, AS PRINCIPAL, WAS BOUND AS TO THE CHANGE IN DATE OF SETTLEMENT BY THE UNAUTHORIZED REPRESENTATIONS OF ITS AGENT, A REPRESENTATIVE OF THE PETITIONER, BEHRING, IF TRUE REPRESENTATIONS AS TO THE SAME MATTER WERE WITHIN THE AGENT'S AUTHORITY AND IF THE RESPONDENT, SUN OIL CO., HAD NO NOTICE THAT THE REPRESENTATIONS WERE UNAUTHORIZED CONFLICTS WITH APPLICABLE FLORIDA LAW.

In its opinion dated June 6, 1973 denying the Petition for Rehearing (Appendix A to Petition), the United States Court of Appeals for the Fifth Circuit expressed the following reasoning and rulings regarding the responsibility of the Petitioner Ahrenholz for the unauthorized change of the date of settlement from July 15, 1969 to September 25, 1969 with an option to extend the closing date another 180 days as accepted by a representative of the Petitioner Behring, the agent of Ahrenholz for the particular matter:

> "Ahrenholtz's theory of the case can be described this way. When, around July 25, Behring's representative and Sun's representative met to consider whether Behring would agree to the changes required by Sun, Ahrenholtz agreed (in a telephone conversation with Behring's representative) to a 60-day extension of the closing date. Behring's representative then changed paragraph 9 of the proposed contract so that it provided for settlement on or before September 25. If the consequence of this change was to leave in effect the right of the Buyer (Sun) to extend the closing date for a period of 180 days from September 25, the 'aforesaid date', referred to in paragraph 9 as amended, then the change made by Behring's representative departed from what Ahrenholtz had agreed to, and Ahrenholtz is bound to no more than he agreed to.
>
> The contract, as amended, to which only Behring and Sun were parties, was unambiguous. It may not be rendered ambiguous by misunderstandings—if there were any—in a private conversa-

> tion between Behring's representative and Ahrenholtz. *For purposes of assenting to changes in the proposed contract, Ahrenholtz made Behring's representative his own representative.* As between Ahrenholtz and Sun, under fundamental principles of agency law Ahrenholtz cannot escape responsibility for the commitment made by his representative. Whether Behring's negotiator had actual or apparent authority to represent Ahrenholtz's position, Ahrenholtz is responsible for the negotiator's [allegedly] unauthorized representations if true representations as to the same matter were within his authority, and if Sun had no notice that the representations were unauthorized. Restatement (2d), Agency §§51, 145, 149, 162, 169. Ahrenholtz gave Sun no notification of any limitations, and nothing about the course of dealing or the relative positions of the parties indicates that Sun should have known or had reason to know of Ahrenholtz's intentions or instructions about the 60 day extension. See Restatement (2d), Agency §9." (Appendix A to Petition, pp. 2–3; Emphasis Supplied.)

The legal determination by the Fifth Circuit Court of Appeals that Ahrenholz is responsible for the unauthorized representations of Behring's negotiator, who was also Ahrenholz's representative upon actual or apparent authority, if true representations as to the same matter were within his authority, and if Sun Oil had no notice that the representations were unauthorized conflicts with the applicable Florida law.

The Supreme Court of Florida in *Yates v. Yates*, 3 So. 821, 24 Fla.64 (1888) held that "if a special agent exceeds his authority, the principal is not bound, unless the latter in some way subsequently ratifies the act". *See also Rhode v. Gallat*, 70 So.471, 70 Fla.536 (1915). The only other exception in Florida law, besides ratification, which holds the principal responsible for the unauthorized acts of its agent would be the situation "where the principal conducts his affairs in such a way as to lead third parties to reasonably conclude that this agent is acting within his authority". *Florida Dairies Co. v. Rogers*, 161 So.85, 119 Fla.451 (1935). However, when a third party is dealing with a *special agent*, the burden is upon the third party to ascertain the strict extent of the agent's authority.

> When one deals with a special agent or an agent who has only special authority to act for his principal, he acts at his peril, for he must acquaint himself with the strict extent of the agent's authority and deal with the agent accordingly. Such third person must inquire into the extent of the agent's authority; he is not justified in relying upon any appearance of authority except that which is directly deducible from the nature of the authority actually conferred. *Ball v. Yates*, 29 So.2d 729, 158 Fla.521 (1946), *cert. denied*, 68 S.Ct.66, 332 U.S. 774, 92 L.Ed.359.

The ruling of the Fifth Circuit Court of Appeals directly conflicts with the above-stated Florida law by holding that an agent who has special authority to act for a principal can bind the principal for an unauthorized act of the agent, regardless of ratification by the principal or

some affirmative conduct of the principal evidencing the authority of the agent to engage in unauthorized acts or make unauthorized representations; the only necessary conditions stated by the Fifth Circuit Court of Appeals being that true representations as to the same matter were within the agent's authority and the third party had no notice that the representations were unauthorized. Such a legal determination by the Fifth Circuit Court of Appeals effectively contravenes the agency law of Florida and supplies additional exceptions, non-existent in the law of Florida, to the general rule that a principal is not bound by the unauthorized acts of his agent. In further departure from the applicable law in Florida, the Fifth Circuit places the burden of discerning the authority of the agent as to particular representations within the agent's special authority upon the principal rather than the third party dealing with the agent—"if Sun had no notice that the representations were unauthorized" (Appendix A to Petition, p. 3), thus inferring that the principal has an affirmative duty to notify the third party of the limits and extent of the agent's authority. To the contrary, the law in Florida, as previously recited in *Ball v. Yates*, 29 So.2d 729, 158 Fla.521 (1946), *cert. denied*, 68 S.Ct.66, 332 U.S.774, 92 L.Ed.359, is that a third party who deals with a special authority "acts at his peril" and has an affirmative duty to "inquire into the extent of the agent's authority". By transferring the duty from one of inquiry by the third party to one of disclosure or notification by the principal, the Fifth Circuit Court of Appeals most respectfully ruled counter to the agency law in Florida applicable to this particular cause.

2. THE OPINIONS RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT VIOLATED THE RIGHTS OF THE PETITIONERS, BEHRING CORPORATION AND L. T. AHRENHOLZ, SEVERALLY, TO TRIAL BY JURY AS GUARANTEED BY AMENDMENT VII TO THE CONSTITUTION OF THE UNITED STATES BY REVERSING A JURY VERDICT FOR THE PETITIONERS.

By reversing a jury verdict and final judgment based thereon in favor of the petitioners at the District Court level and against the respondent on both the respondent's complaint and the counterclaims and granting specific performance to the respondent as sought in the complaint, the Fifth Circuit Court of Appeals has violated the rights of the petitioners, Behring and Ahrenholz, to trial by jury as guaranteed by Amendment VII of the Constitution of the United States.

Prior to trial of the cause in the District Court, an order was entered by the Court on November 5, 1971 which, upon the authority of *Beacon Theatres, Inc. v. Westover*, 359 U.S.500, 79 S.Ct.948 (1959), provided for the trial of the cause by jury to insure the petitioners' right to trial by jury of the legal issues (Appendix F to Petition). However, the Fifth Circuit in its opinions (Appendix A and B to Petition) transformed the issues of fact properly presented to and decided by a jury in favor of the Petitioners into issues of law or matters of equity which were resolved by the Fifth Circuit Court of Appeals in favor of the respondent. In granting the equitable remedy of specific performance to the respondent, the Fifth Circuit

Court of Appeals decided the equitable claim first and deprived the petitioners of their constitutional right to trial by jury of the legal issues.

3. THE OPINIONS RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, BEING PREDICATED UPON A PROPOSED PRE-TRIAL STIPULATION NOT ACCEPTED BY THE PETITIONERS, VIOLATED THE RIGHTS OF THE PETITIONERS, BEHRING CORPORATION AND L. T. AHRENHOLZ, SEVERALLY, TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES.

In its opinion dated June 6, 1973 (Appendix A to Petition), the Fifth Circuit Court of Appeals admitted that the prior opinion of April 10, 1973 (Appendix B to Petition) "erroneously stated that by formal pre-trial stipulation the parties agreed that Ahrenholz knew of and agreed to and ratified the change in the closing date in the contract". Such stipulation was never accepted by petitioners. Accordingly, it was and is the contention of the petitioners that the Fifth Circuit opinion of April 10, 1973, being predicated upon a proposed pre-trial stipulation not accepted by petitioners, violated the petitioners constitutional rights to due process of law and equal protection of the law.

The Fifth Circuit Court of Appeals in its subsequent opinion of June 6, 1973 (Appendix A to Petition) attempted to rectify its error as to the stipulation by holding that "the absence of a consummated stipulation does not, how-

ever, change the result". (Appendix A to Petition, p. 2.) The rationale of the Fifth Circuit was that even if Ahrenholz had neither accepted nor executed the pre-trial stipulation which expressed his agreement to and ratification of the change in the date of settlement from July 15, 1969 to September 25, 1969 with the option to extend the closing date remaining, then his agreement to such a change in the date of settlement can be extracted from the agency relationship between Ahrenholz, as principal, and Behring's negotiator, as agent, who without authority from Ahrenholz agreed to the September 25, 1969 closing date. As discussed previously in the first reason for granting the writ, the Fifth Circuit Court of Appeals ruled contrary to the law in Florida in determining that Ahrenholz could not escape responsibility for the unauthorized representations made by Behring's representative.

IX

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review and reverse or quash the judgment, decision and opinions of the United States Court of Appeals for the Fifth Circuit on the grounds so stated in the petition.

Respectfully submitted,

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BY_____
ROBERT ORSECK

X

CERTIFICATE OF SERVICE

I, ROBERT ORSECK, ESQUIRE, a member of the Bar of the Supreme Court of the United States, representing the petitioners herein, hereby certify that three copies of this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix was mailed this ____ day of _____, 1973 to William A. Meadows, Attorney for Respondents, 1150 S.W. 1st Street, Miami, Florida, by depositing the same in a United States Post Office or mailbox, with first class postage, pre-paid, addressed to counsel of record at his post office address.

BY_____

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APPENDIX

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G	JURY VERDICT OF UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA	App. 21
H	ORDER OF UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA DENYING PLAINTIFF'S MOTION FOR NEW TRIAL, FOR JUDGMENT NOTWITHSTANDING VERDICT AND REMITTITUR	App. 22

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2493

SUN OIL COMPANY,
Plaintiff-Appellant,

versus

BEHRING PROPERTIES, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

(June 6, 1973)

Before AINSWORTH, GODBOLD and CLARK,
Circuit Judges.

GODBOLD, Circuit Judge: By petition for rehearing appellees correctly point out that our opinion erroneously stated that by formal pre-trial stipulation the parties agreed that Ahrenholz knew of and agreed to and ratified the change in the closing date in the contract. See also footnote 7 of our opinion. Such a stipulation was proposed by plaintiff but apparently not accepted by the defendants. The absence of a consummated stipulation does not, however, change the result.

Ahrenholtz's theory of the case can be described this way. When, around July 25, Behring's representative and Sun's representative met to consider whether Behring would agree to the changes required by Sun, Ahrenholtz agreed (in a telephone conversation with Behring's representative) to a 60-day extension of the closing date. Behring's representative then changed paragraph 9 of the proposed contract so that it provided for settlement on or before September 25. If the consequence of this change was to leave in effect the right of the Buyer (Sun) to extend the closing date for a period of 180 days from September 25, the "aforesaid date," referred to in paragraph 9 as amended, then the change made by Behring's representative departed from what Ahrenholtz had agreed to, and Ahrenholtz is bound to no more than he agreed to.

The contract, as amended, to which only Behring and Sun were parties, was unambiguous. It may not be rendered ambiguous by misunderstandings—if there were any—in a private conversation between Behring's representative and Ahrenholtz. For purposes of assenting to changes in the proposed contract, Ahrenholtz made Behring's representative his own representative. As between Ahrenholtz and Sun, under fundamental principles of agency law

Ahrenholtz cannot escape responsibility for the commitment made by his representative. Whether Behring's negotiator had actual or apparent authority to represent Ahrenholtz's position, Ahrenholtz is responsible for the negotiator's [allegedly] unauthorized representations if true representations as to the same matter were within his authority, and if Sun had no notice that the representations were unauthorized. Restatement (2d), Agency §§ 51, 145, 149, 162, 169. Ahrenholtz gave Sun no notification of any limits to Behring's authority, nothing appears in the record to indicate Sun know of any limitations, and nothing about the course of dealing or the relative positions of the parties indicates that Sun should have known or had reason to know of Ahrenholtz's intentions or instructions about the 60 day extension. See Restatement (2d), Agency §9.

The petition for rehearing is DENIED.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-2493

SUN OIL COMPANY,
Plaintiff-Appellant,

versus

BEHRING PROPERTIES, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 10, 1973)

Before AINSWORTH, GODBOLD and CLARK,
Circuit Judges.

GODBOLD, Circuit Judge: This suit arose out of a proposed but abortive sale of Florida real estate to Sun Oil for a filling station site. Behring, the owner, executed and delivered to Sun a proposed agreement of sale on Sun's form, to be sent to Sun's home office for its approval and execution. Before Sun had acted Behring conveyed by warranty deed to Ahrenholz for a lesser consideration than it

was to receive from Sun.[1] The deed recited: "The foregoing land is conveyed subject to that certain Agreement of Sale dated the ____ day of ____, 1969 between the Grantor herein and Sun Oil Company."

Paragraph 9 of the proposed agreement provided:

> 9. SETTLEMENT: Settlement shall be held on or before the 15th day of July A.D. 1969, unless Seller is unable to convey said premises to Buyer in accordance with paragraph 5 hereof or Seller is unable to obtain the permits and licenses provided for in paragraph 8 hereof, in which event or events Buyer shall have the right and privilege, at its option, upon written notice to Seller, to (a) extend the date of settlement for a period of 180 days from the aforesaid date in order to afford an opportunity to clear any defects in the title, in accordance with said paragraph 5 hereof, and/or to permit Buyer to obtain the permits and licenses provided for in paragraph 8 hereof, or (b) cancel this agreement, whereupon all right of the parties shall cease and determine. Buyer may also extend the date of settlement for the above period of time if Buyer is unable to obtain a satisfactory survey of said premises by date of settlement . . .

Sun executed the document on condition that the legal description be corrected, a later closing date be negotiated, and a provision added that a street right of way would be dedicated by Behring and accepted by the county. Sun

[1]Behring wanted the property off its books before the end of its fiscal year. Ahrenholz wanted a quick profit.

withheld delivery pending determination of whether these changes were agreed upon. Behring's representative informed Sun of the conveyance to Ahrenholz, and secured Ahrenholz's consent to make changes. The representative corrected the legal description. In paragraph 9 he struck through "15th" and "July" and in lieu thereof inserted "25th" and "Sept." He added a separate clause requiring dedication and acceptance of the right of way. He initialed all the changes. With these changes made, Sun delivered the agreement, and the contract, in its amended form, became effective. Neither then nor later did Ahrenholz execute the Behring-Sun agreement, nor did anyone sign it on his behalf. It was never assigned to Ahrenholz nor did he ever assume Behring's obligations thereunder. He simply assented to changes in a proposed agreement to sell the land of which he had become owner, to which agreement he recognizes his title became subject when the agreement was consummated.

By letter to Behring dated September 24, Sun gave notice to Behring that a building permit, provided for in paragraph 8 and referred to in paragraph 9, had not been received, nor had Sun been assured of the dedication and acceptance of the right of way, and it was, therefore, extending the date of settlement for not to exceed 180 days beyond September 25.

From then until February, Sun and Behring's counsel and representatives dealt with each other about the property. The building permit matter was soon resolved. Sun discovered what it contended were clouds on the title. Some of these Behring's counsel acknowledged were encumbrances violating Behring's obligation under the agreement to convey a good and marketable title free of liens, easements and restrictions and insurable by a title insurance

company.[2] The existence of others was undisputed but not their effect.[3] The right of way was at first not dedicated, then later was dedicated, but never accepted by the county. In short, before and after September 25, at least until late December or early January, Sun and Behring, working together, were attempting to get the transaction into satisfactory form to close. Counsel for Behring did, however, repeatedly ask that a closing date be set, and objected to what he considered to be dilatoriness by Sun.

On February 20, before the expiration of 180 days from September 25, Ahrenholz notified Sun that its delay in closing was unjustified and he considered Sun had breached the contract.[4] Shortly before expiration of 180 days Sun tendered performance. Neither Behring nor Ahrenholz appeared at the time and place designated for closing.[5] By that time most, if not all, of the defects in title had been either removed or acceded to by Sun, but the dedication of the right of way had not been accepted by the county.

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[2]There were elaborate subdivision building restrictions, including a restriction against using the property for a service station. Also there were utility easements.

[3]There were reservations in favor of a drainage district. The title insurance binder obtained by Sun noted them as an exception to its insurance coverage. Behring's counsel took the position these were not under Florida law encumbrances justifying refusal to close.

[4]In the letter he asserted he was successor in title to Behring, which he was, and assignee, which he was not.

[5]Even then Ahrenholz did not treat the contract as terminated. He called the title company where the closing was to occur and attempted to determine what conditions Sun would impose at the closing, but was unable to find out. He told the title company he would not be present, that the notice to him of closing was too short.

Sun sued Ahrenholz and Behring for specific performance. Ahrenholz counterclaimed for breach of contract and demanded a jury. Behring counterclaimed for an equitable lien to protect its interests. The court ordered all issues tried by jury. The jury found in favor of defendants on the claim for specific performance and awarded Ahrenholz damages of $7,500 on his counterclaim. We reverse and direct that Sun be granted specific performance.

Sun was entitled to the directed verdict which it requested. Sun had the right to extend the time of closing for 180 days. By formal pre-trial stipulation the parties agreed that "Ahrenholz knew of and agreed to and ratified the change in the closing date in the contract." As amended, the contract is unambiguous. In addition it contains an integration clause.[6] Ahrenholz cannot escape the effect of its unambiguous terms by his testimony that he understood in agreeing to the change in the closing date that he was agreeing to an extension of 60 days (from July 25 to September 25), and that Sun would be required to close by September 25 with no right to further extend the time.[7] Coupled with this is Ahrenholz's theory that after September 25 the contract remained in effect but that Sun had only a reasonable time in which to close, which time it exceeded.[8]

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[6]"This agreement merges all prior negotiations and understandings between the parties and constitutes their entire contract. . . . ."

[7]Ahrenholz's trial testimony that Behring's representative, by telephone, communicated a request for a 60-day extension and that he assented to a 60-day extension, implies that Behring's attorney, who acted on Ahrenholz's behalf in making the changes, did not properly comply with the authorization given by Ahrenholz (which would have required striking considerable portions of par. 9 or rewriting it). This simply departs from the stipulated facts.

[8]For purposes of discussion only we have assumed — and the assumptions are big ones — that Ahrenholz had rights to approve or

Appellees seek to escape the 180-day extension on the ground it was untimely given. The letter was mailed September 24 but addressed to Behring at 4800 rather than 2800 E. Oakland Park Boulevard, the address provided in the agreement, and reached Behring by certified mail on September 27. We pretermit whether notice was required to be given by September 25 and whether it was effective when mailed or upon receipt. The District Judge found (and we think correctly) that time was not of the essence of the contract. And, additionally, both Behring and Ahrenholz treated the contract as continuing in effect,[9] they continued to attempt to perform, and Behring repeatedly called on Sun to speed up its performance. Then 148 days after September 25, Ahrenholz—not Behring—claimed a breach. The post-litigation claim of untimely notice, must be rejected.

REVERSED and REMANDED with directions to grant specific performance to appellant.

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disapprove the changes in the proposed Sun-Behring contract, to declare it breached, and to sue for damages for the alleged breach. Behring assented to the proposed contract, as amended, by its representative's entering and initialing the changes, after which Behring executed it.

Ahrenholz was a proper party defendant to a suit for specific performance. Drake v. Brady, 48 So. 978 (Fla. 1909); Drake Lumber Co. v. Branning, 64 So. 263 (Fla. 1914); Hannan v. Holz, 92 So. 874 (Fla. 1922), Fisher v. Miller, 109 So. 257 (Fla. 1926); Harris v. Requa, 140 So. 911 (Fla. 1932); Hartford Fire Ins. Co. v. Brown, 160 So. 657 (Fla. 1935).

[9]As late as December 8, Behring's representative acknowledged that Behring could not convey the land free of utility easements and asked that Sun accept a modified easement or "releas[e] us from any further obligations under this contract."

UNITED STATES DISTRICT CCURT
OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-2493

D. C. Docket No. CA 1559

SUN OIL COMPANY,
Plaintiff-Appellant,

versus

BEHRING PROPERTIES, INC., ET AL,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before AINSWORTH, GODBOLD and CLARK,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to grant specific performance to appellant in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

April 10, 1973

Issued as Mandate: JUN 14 1973

APPENDIX "C"

[652]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 70-1559 (Civ-EC)

SUN OIL COMPANY,
a New Jersey corporation,

Plaintiff,

vs.

BEHRING PROPERTIES, INC., a Florida corporation, BEHRING CORPORATION, a Delaware corporation, L. T. AHRENHOLZ and MARY L. AHRENHOLZ,

Defendants.

[Filed March 7, 1972]

FINAL JUDGMENT

THIS CAUSE was tried before the Court and jury on Thursday, February 17, 1972, and Friday, February 18, 1972, and pursuant to the verdict rendered herein for the Defendants and against the Plaintiff, Final Judgment be and is hereby entered for the Defendants, BEHRING PROPERTIES, INC., BEHRING CORPORATION, L. T.

AHRENHOLZ and MARY L. AHRENHOLZ and against the Plaintiff, SUN OIL COMPANY, and the relief sought by Plaintiff be and same is hereby denied.

It is further ordered and adjudged that Defendant, L. T. AHRENHOLZ, as Counterclaimant, recover the amount of Seven Thousand Five Hundred and no/100 ($7,500.00) Dollars on his Counterclaim against the Plaintiff/Counter-defendant and judgment be and the same is hereby entered for L. T. AHRENHOLZ and against SUN OIL COMPANY in such sum for which let execution issue.

Further, it is ordered and the Notice of Lis Pendens filed by SUN OIL COMPANY as to the land which was the subject of this action being:

A parcel of land lying in Tract 13 of FORT LAUDERDALE TRUCK FARMS SUBDIVISION, of Section 10, Township 49 South, Range 41 East, being more particularly described as follows:

[653] BEGINNING at a point of tangency of the proposed North R/W line of Commercial Boulevard with the arc of a proposed curve connecting said line of Commercial Boulevard with the proposed East R/W line of University Drive; run thence (1) East along said line of Commercial Boulevard, 175 feet to a point; run thence (2) North, parallel with said line of University Drive, 300 feet to a point in the proposed South R/W line of N.W. 57th Street; run thence (3) West along said line of N.W. 57th Street, 175 feet to a point of tangency therein with the arc of a pro-

posed R/W curve; run thence (4) southwesterly along the arc of said curve, a concave curve having an arc length of 39.27 feet to its point of tangency with said East line of University Drive, run thence (5) South along said line of University Drive, 250 feet to its point of tangency with the arc of a proposed R/W curve; run thence (6) Southeasterly along the arc of said curve, a concave curve having an arc length of 39.27 feet to the point and place of BEGINNING.

is hereby set aside, striken and cancelled of record.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 24th day of February, 1972.

/s/ Emett C. Choate

SENIOR JUDGE, UNITED STATES DISTRICT COURT

cc: Heiman and Crary, P.A.
Preddy, Haddad, Kutner & Hardy, P.A.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

August 10, 1973

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 72-2493—Sun Oil Company vs. Behring Properties, Inc., Et Al

Gentlemen:

The following action has this day been taken in the above case:

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

(xx) A further stay of mandate has been granted to and including 9/4/73.

( ) The Court's opinion-order on petition for rehearing and petition for rehearing en banc has this day been rendered and a copy thereof is enclosed.

( ) Joint Motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

( )

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Maryette Farley
Deputy Clerk

/mkf
cc: Mr. William A. Meadows, Jr.
Mr. Eugene C. Heiman
Mr. Robert Orseck
Mr. Gilbert A. Haddad

APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-2493

SUN OIL COMPANY,
Plaintiff-Appellant,
versus

BEHRING PROPERTIES, INC., ET AL,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

[Filed July 25, 1973]

Before AINSWORTH, GODBOLD and CLARK,
Circuit Judges.

ON CONSIDERATION OF THE MOTION of Appellees for recall and stay of judgment issued as mandate in the above numbered and entitled cause, pending an application for a writ of certiorari to the Supreme Court of the United States,

IT IS ORDERED that the judgment issued as mandate, be recalled and stayed to and including August 6,

1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

APPENDIX "F"

[596]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

70-1559-Civ-JLK

SUN OIL COMPANY, etc.
Plaintiff,

vs.

BEHRING PROPERTIES, INC., et al,
Defendants.

[Filed November 5, 1971]

ORDER

THIS CAUSE came on for consideration upon motion by defendants L. T. Ahrenholz and Mary L. Ahrenholz to amend the record of the pre-trial conference to provide for the trial of this cause before a jury. Plaintiff's complaint prays for specific performance, cancellation of mortgage, cancellation and set-off of interest and principal damages, and other equitable relief arising from breach of contract for the sale of land.

By compulsory counterclaim defendants urged that plaintiff had breached the contract in question and caused damages to plaintiff.

The United States Supreme Court in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 held that where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot new anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims," supra, at 510–511.

While the major issue of this case is plaintiff's prayer for recission, a matter of equity, defendant's counterclaim raises the issue of breach of contract and damages resulting therefrom. That issue is legal in form and although incidental to the major question supports defendants right to a jury trial. It is therefore,

[597] ORDERED and ADJUDGED that defendant's motion to amend the record of pre-trial conference be and the same is hereby granted. The record of the pre-trial conference is hereby amended to provide for the trial of this cause by jury.

DONE and ORDERED in chambers at Miami, Florida, this 5th day of November, 1971.

/s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

cc: Heiman and Crary
Preddy, Haddad, Kutner and Hardy

APPENDIX "G"

[651]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 70-1559-Civ-EC

SUN OIL COMPANY,
a New Jersey corporation,
Plaintiff,

v.

BEHRING PROPERTIES, INC., a Florida corporation; BEHRING CORPORATION, a Delaware corporation; L. T. AHRENHOLZ and MARY L. AHRENHOLZ,
Defendants.

[Filed February 22, 1972]

VERDICT

February 18, 1972
(date)

Miami, Florida
(place)

We, the Jury, find for the defendants, and assess the damages of counterclaimant, L. T. Ahrenholz, in the amount of $7500.

So say we all.

/s/ Nicholas Ajhor
Foreman

APPENDIX "H"

[671]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 70-1559-Civ-EC

SUN OIL COMPANY, etc.,

Plaintiff,

v.

BEHRING PROPERTIES, INC., et al.,

Defendant.

[Filed April 7, 1972]

ORDER

This cause came before the court on plaintiff's motions

- ☐ To dismiss
- ☐ For extension of time
- ☐ To strike
- ☐ To compel
- ☐ For protective order
- ☐ For leave to amend

☐ For new trial

☐ For continuance

☒ For judgment notwithstanding verdict, for new trial, and remittitur

The court has considered the record in the cause, and it is

ORDERED and ADJUDGED that said motions are each denied.

DONE and ORDERED at Miami, Florida, this 5th day of April, 1972.

/s/ Emett C. Choate

SENIOR UNITED STATES
DISTRICT JUDGE

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 28 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-391

BEHRING PROPERTIES, INC., BEHRING CORPORATION, L. T. AHRENHOLZ, AND MARY L. AHRENHOLZ,

Petitioners,

vs.

SUN OIL COMPANY,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HEIMAN AND CRARY
Attorneys for Respondents
Suite 500, Brickell Executive Tower
1428 Brickell Avenue
Miami, Florida 33131

MIAMI REVIEW — 371-4053 — 377-8721

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In the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-391

BEHRING PROPERTIES, INC., BEHRING CORPORATION, L. T. AHRENHOLZ, AND MARY L. AHRENHOLZ,

Petitioners,

vs.

SUN OIL COMPANY,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The questions presented as stated in the Petitioners' Brief will be restated by the Respondent to demonstrate the questions properly presented by their Petition:

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A CLEARLY CORRECT APPLICATION OF STATE LAW BY THE COURT BELOW.

II. WHETHER THE DECISION BY THE COURT BELOW THAT RESPONDENT WAS ENTITLED TO A DIRECTED VERDICT CONSTITUTES A DENIAL OF THE RIGHT TO TRIAL BY JURY.

III. WHETHER THE PRINCIPLES OF EQUAL PROTECTION OR DUE PROCESS ARE VIOLATED BY A COURT CORRECTING UPON REHEARING A MISTAKE OF FACT MADE IN THE INITIAL OPINION.

COUNTER-STATEMENT OF THE CASE

Petitioners' convoluted statement of the case bears no relation to what actually transpired. For this reason, Respondent will recite the facts by quoting from the opinion in this cause of the United States Court of Appeals for the Fifth Circuit.

> "This suit arose out of a proposed but abortive sale of Florida real estate to Sun Oil for a filling station site. Behring, the owner, executed and delivered to

Sun a proposed agreement of sale on Sun's form, to be sent to Sun's home office for its approval and execution. Before Sun had acted Behring conveyed by warranty deed to Ahrenholz for a lesser consideration than it was to receive from Sun. The deed recited: 'The foregoing land is conveyed subject to that certain Agreement of sale dated the ____ day of _____, 1969 between the Grantor herein and Sun Oil Company.'

Paragraph 9 of the proposed agreement provided:

> 9. SETTLEMENT: Settlement shall be held on or before the 15th day of July A.D. 1969, unless Seller is unable to convey said premises to Buyer in accordance with paragraph 5 hereof or Seller is unable to obtain the permits and licenses provided for in paragraph 8 hereof, in which event or events Buyer shall have the right and privilege, at its option, upon written notice to Seller, to (a) extend the date of settlement for a period of 180 days from the aforesaid date in order to afford an opportunity to clear any defects in the title, in accordance with said paragraph 5 hereof, and/or to permit Buyer to obtain the permits and licenses provided for in paragraph 8 hereof, or (b) cancel this agreement, whereupon all right of the parties shall cease and determine. Buyer may also extend the date of settlement for the above period of time if Buyer is unable to obtain a satisfactory survey of said premises by date of settlement . . .

Sun executed the document on condition that the legal description be corrected, a later closing date be negotiated, and a provision added that a street right of

way would be dedicated by Behring and accepted by the county. Sun withheld delivery pending determination of whether these changes were agreed upon. Behring's representative informed Sun of the conveyance to Ahrenholz, and secured Ahrenholz's consent to make changes. The representative corrected the legal description. In paragraph 9 he struck through '15th' and 'July' and in lieu thereof inserted '25th' and 'Sept.' He added a separate clause requiring dedication and acceptance of the right of way. He initialed all the changes. With these changes made, Sun delivered the agreement, and the contract, in its amended form, became effective. Neither then nor later did Ahrenholz execute the Behring-Sun agreement, nor did anyone sign it on his behalf. It was never assigned to Ahrenholz nor did he ever assume Behring's obligations thereunder. He simply assented to changes in a proposed agreement to sell the land of which he had become owner, to which agreement he recognizes his title became subject when the agreement was consummated.

By letter to Behring dated September 24, Sun gave notice to Behring that a building permit, provided for in paragraph 8 and referred to in paragraph 9, had not been received, nor had Sun been assured of the dedication and acceptance of the right of way, and it was, therefore, extending the date of settlement for not to exceed 180 days beyond September 25.

From then until February, Sun and Behring's counsel and representatives dealt with each other about the property. The building permit matter was soon resolved. Sun discovered what it contended were clouds on the title. Some of these Behring's counsel acknowl-

edged were encumbrances violating Behring's obligation under the agreement to convey a good and marketable title free of liens, easements and restrictions and insurable by a title insurance company. The existence of others was undisputed but not their effect. The right of way was at first not dedicated, then later was dedicated, but never accepted by the county. In short, before and after September 25, at least until late December or early January, Sun and Behring, working together, were attempting to get the transaction into satisfactory form to close. Counsel for Behring did, however, repeatedly ask that a closing date be set, and objected to what he considered to be dilatoriness by Sun.

On February 20, before the expiration of 180 days from September 25, Ahrenholz notified Sun that its delay in closing was unjustified and he considered Sun had breached the contract. Shortly before expiration of 180 days Sun tendered performance. Neither Behring nor Ahrenholz appeared at the time and place designated for closing. By that time most, if not all, of the defects in title had been either removed or acceded to by Sun, but the dedication of the right of way had not been accepted by the county.

Sun sued Ahrenholz and Behring for specific performance. Ahrenholz counterclaimed for breach of contract and demanded a jury. Behring counterclaimed for an equitable lien to protect its interests. The court ordered all issues tried by jury. The jury found in favor of defendants on the claim for specific performance and awarded Ahrenholz damages of $7,500 on his counterclaim." (App. 4-8 of Petitioners' Brief)

The United States Court of Appeals for the Fifth Circuit reversed this judgment, holding as a matter of law that the contract had not been breached and that Sun Oil, accordingly, was entitled to specific performance. The cause was remanded by the Fifth Circuit with directions to the Trial Court to grant specific performance to Sun Oil.

POINT I

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A CLEARLY CORRECT APPLICATION OF STATE LAW BY THE COURT BELOW.

It is obvious from Petitioners' own statement of Question I that their sole claim is that the United States Court of Appeals for the Fifth Circuit misapplied or misconstrued the applicable Florida law pertaining to agency. This Court has held that questions of the proper application of state law to non-federal questions simply do not merit a grant of certiorari. See, e.g., *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456 (1967), and cases cited therein at 462.

Moreover, the Fifth Circuit correctly applied the Florida Law of Agency. The cases cited by Petitioner, while correct statements of certain abstract propositions of law, have no application to the case at bar. In fact, *Ball v. Yates*, 29 So.2d 729, 158 Fla. 521 (1946), clearly states a proposition of law which, when applied to the facts at bar, are clearly consistent with the holding of the Fifth Circuit. There it was held that one who deals with a special agent

or an agent who has only special authority to act for his principal, is not justified in relying upon any apperance of authority except that which is directly deducible from the nature of the authority actually conferred. The Fifth Circuit in its opinion dated June 6, 1973 denying the Petition for Rehearing, stated that for purposes of assenting to the changes in the proposed contract, Ahrenholz made Behring's representative his own representative. Petitioner does not quarrel with this statement. Accordingly, the agent did exactly what he was authorized to do by assenting to certain changes. Therefore, this is not a question of a special agent exceeding his authority, as urged by Petitioner, since the special agent, Behring's representative, did precisely what he was authorized to do by assenting to a change in the proposed contract. What we are really faced with here is a principal imposing secret and unusual restrictions upon the authority of an agent. Where this occurs the unusual restrictions must be communicated to persons dealing with the agent. In these circumstances, if such unusual restrictions are not communicated to the third party, the principal is bound. See *Standard Oil Company v. Nickerson*, 138 So. 55, 103 Fla. 701.

POINT II

WHETHER THE DECISION BY THE COURT BELOW THAT RESPONDENT WAS ENTITLED TO A DIRECTED VERDICT CONSTITUTES A DENIAL OF THE RIGHT TO TRIAL BY JURY.

Petitioners' complaint under this question is only that the United States Court of Appeals for the Fifth Circuit improperly directed a verdict for Respondent. If an im-

properly directed verdict amounted to a denial of the right to a trial by jury, any directed verdict could be turned into a constitutional question. This is simply not the law. The cases are legion that a directed verdict is not an impairment to the right to trial by jury. See, e.g., *Galloway v. United States*, 319 U.S. 372 (1943); *Lyon v. Mutual Benefit Health and Accident Association*, 305 U.S. 484 (1939); *Coughran v. Bigelow*, 164 U.S. 308 (1896).

POINT III

WHETHER THE PRINCIPLES OF EQUAL PROTECTION OR DUE PROCESS ARE VIOLATED BY A COURT CORRECTING UPON REHEARING A MISTAKE OF FACT MADE IN THE INITIAL OPINION.

Question Number III as stated by Petitioners is a distortion of the record. The United States Court of Appeal for the Fifth Circuit corrected its error in the opinion on rehearing (Appendix A to the Petitioners' Brief) and stated that the stipulation had no impact upon the result:

> "By petition for rehearing appellees correctly point out that our opinion erroneously stated that by formal pre-trial stipulation the parties agreed that Ahrenholz knew of and agreed to and ratified the change in the closing date in the contract. See also footnote 7 of our opinion. Such a stipulation was proposed by plaintiff but apparently not accepted by the defendants. The absence of a consummated stipulation does not, however, change the result." (App. 2 to Petitioners' Brief)

CONCLUSION

The Petition for Writ of Certiorari does not present any question which should be heard by this Honorable Court. Accordingly, the Petition should be denied.

OF HEIMAN AND CRARY
Attorneys for Respondent
Suite 500, Brickell Executive Tower
1428 Brickell Avenue
Miami, Florida 33131

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served by mail upon ROBERT ORSECK, ESQUIRE, Second Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130; PREDDY, HADDAD, KUTNER AND HARDY, Fifth Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130; and PODHURST, ORSECK & PARKS, P.A., Second Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130, this ____ day of September, 1973.

_____

Of Counsel

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In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-391

BEHRING PROPERTIES, INC., BEHRING CORPORATION, L. T. AHRENHOLZ and MARY L. AHRENHOLZ,

Petitioners,

vs.

SUN OIL COMPANY,

Respondent.

PETITION FOR REHEARING

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-and-
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MIAMI REVIEW — 371-4853 — 377-3721

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BEHRING PROPERTIES, INC., BEHRING CORPORATION, L. T. AHRENHOLZ and MARY L. AHRENHOLZ,

Petitioners,

vs.

SUN OIL COMPANY,

Respondent.

PETITION FOR REHEARING

Petitioners respectfully move the Court to rehear this matter and reconsider the question of jurisdiction on the following grounds:

1. Respondent sued Petitioners AHRENHOLZ for specific performance of a contract to sell land.

2. Petitioners ARRENHOLZ answered—denied the allegations—and asserted affirmatively by counterclaim that Respondent willfully and intentionally breached the contract itself.

3. After a jury trial on the many factual issues, the jury returned a verdict for Petitioners on the Counterclaim in the amount of $7,500.00.

4. On abundant evidence the jury found that Respondent had willfully and intentionally breached the contract and that Petitioners had been damaged by such willful breach to the extent of $7,500.00.

5. For this case to be concluded with Respondent being rewarded for its adjudicated misconduct would be a miscarriage of justice and a clear deprivation of Petitioner's right to trial by jury and equal protection.

6. The record of the trial is heavy with evidence to support the verdict that Respondent itself intentionally breached the contract it seeks to enforce. A simple case based on facts has been obfuscated. Only recognition of the right to trial by jury can prevent injustice.

A reconsideration is urgently requested.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to HEIMAN AND CRARY, Attorneys for Respondent, Suite 550, Brickell Executive Tower, 1428 Brickell Avenue, Miami, Florida, this 27th day of November, 1973.

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-and-

PODHURST, ORSECK & PARKS
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66 West Flagler Street
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Counsel for Petitioners

By: _____
ROBERT ORSECK